90-716

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE S. KRAIN,

Petitioner,

v.

MARGARET JOHNSON, JOAN HILBRICK, WALLACE WADE, JAMES ALFANO, JERRY HODGES, JAMES CORDIEL and ROCCO GALANTE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Does due process require recusal of appellate court judges who are in pending litigation with a person whose appeal is before them?

2. Did the state courts because of racial bias against Krain willfully fail to consider California CCP 583.340 which tolls the time to bring to trial for various reasons thus denying Krain access to the state court system under the Fifth and Fourteenth Amendments to the United States Constitution?

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PRAYER

Petitioner Lawrence S. Krain respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of The State of California entered in this case on October 17, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is not published in the official reporters; the court's

opinion denying review and denying request for disqualification is attached hereto in the Appendix. The opinions of the Court of Appeal of the State of California denying his motion to disqualify are not published in the official reporters. Those opinions are attached hereto in the Appendix.

JURISDICTION

On October 17, 1990, the Supreme Court of the State of California denied Petitioner's petition for review and request for disqualification of certain justices. On July 27, 1990, the Court of Appeal of the State of California affirmed in part the lower court's decision of March 17, 1989. A petition for rehearing was filed in the Court of Appeal (August 13, 1990 and denied August 15, 1990). On June 19, 1990, the Court of Appeal denied Petitioner's motion to disqualify certain justices.

PERTINENT CONSTITUTIONAL PROVISIONS

Amendment XIV (equal protection clause)

Amendment XIV, Section 1:

> . . . no state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Amendment V (due process clause)

STATEMENT OF THE CASE

In June, 1987, Petitioner filed a complaint in the United States District Court for the Central District of California. Petitioner's complaint, *Krain v. Smallwood, et al.*, No. CV87-5387-TJH, lists Thomas Crosby and Malcolm Lucas as two of the several named defendants. Petitioner's complaint seeks money damages and alleges violations of his federal civil rights against a born Jew, libel and slander, invasion of privacy, intentional infliction of emotional distress, and other claims. Five Orange County, California superior court defamation actions are involved in these consolidated appeals listing the following named defendants:

1. No. 40-70-80 filed July 7, 1983, Jerry Hodges,

2. No. 41-83-29 filed December 15, 1983 Joan Hilbrick,

3. No. 45-24-34 filed March 5, 1985 Margaret Johnson,

4. No. 45-28-24 filed March 8, 1985 Wallace Wade and Jerry Hodges,

5. No. 45-28-19 filed March 8, 1985 James Alfano, James Cordiel and Rocco Galante.

On February 20, 1989, Petitioner filed another complaint, *Krain v. Ted Millard, Edward Wallin et al.*, CV 89-2512 WPG(s) now before the 9th Circuit Court of Appeals as Docket No. 90-55265, in the United States District Court for the Central District of California. Listed as a named defendant, among others, is Edward Wallin. The prayer for money damages and allegations in this complaint are similar to those contained in the *Krain v. Smallwood* complaint and lists civil rights violations

against Krain as a born Jew and intentional infliction of emotional distress and privacy rights violations.

On or about September 5, 1989, Petitioner filed his brief in the California Court of Appeal, Fourth Appellate District. Petitioner argued, among other contentions, that he was being denied access to the state court system because of delaying tactics of defendants and appeals on related matters in coordinated cases because he was a born Jew. Krain also argued that the court applied the 5 year rule to Krain and not its tolling provisions that it did not to other California nonJewish litigants denying him access to the state court and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.

On July 26, 1989, the United States Court of Appeals for the Ninth Circuit reversed the dismissal of *Krain v. Smallwood* and remanded the case to the United States District Court for the Central District of California for further proceedings. *See Krain v. Smallwood*, 880 F.2d 1119 (9th Cir. 1989).

On January 19, 1990, Petitioner filed a complaint, *Krain v. Kahn, Edward Wallin, Edward Panelli, et al.*, No. CV90-305-JMI, in the United States District Court for the Central District of California. The *Krain v. Kahn* lawsuit names as defendants, among others, Edward Wallin, Malcolm Lucas, and Edward Panelli. On February 20, 1990, Petitioner filed a complaint, *Krain v. University of Michigan Hospital, et al.*, 90 C 972, in the United States District Court for the Northern District of Illinois, now on appeal in the Seventh Circuit Court of Appeals as Docket No. 90-2554. David Eagleson is among the named defendants. The prayers for money damages and allegations in the *Krain v. Kahn* and *Krain v. University of Michigan Hospital lawsuits are similar to those in the Krain v. Smallwood* and *Krain v. Millard and Wallin* lawsuits.

In the lawsuits Eagleson's only involvement is alleged to date back to 1974, Crosby to 1979, Lucas to 1981, Panelli to 1984 (adverse involvement with Krain as a medical doctor treating alleged prostitutes who these justices visited). On June 4, 1990, Petitioner filed in the California Court of Appeal, Fourth Appellate District, a motion to disqualify Justices Milbert Cox, Thomas Crosby, and Edward Wallin from hearing Petitioner's appeal. With respect to Justices Crosby and Wallin, Petitioner based his motion on the grounds that Justices Crosby and Wallin were named defendants in lawsuits that Petitioner had filed, and that they therefore had an interest in the outcome of Petitioner's appeal. On June 19, 1990, the Court of Appeal denied Petitioner's motion to disqualify Justices Cox, Crosby, and Wallin.

On July 27, 1990, the California Court of Appeal affirmed the dismissal of the cases against Hodges (40-70-80) and Hilbrick (41-83-29) that form the basis for this petition for certiorari for reasons stated in its opinion (see Appendix at A-1—A-10).

On or about August 19, 1990, Petitioner asked the Supreme Court of the State of California to review the decision of the Court of Appeal. The petition for review raised issues whether Petitioner's due process rights were violated by the Court of Appeal justices' refusal to recuse themselves. Petitioner also filed a request to disqualify Supreme Court Justices Malcolm Lucas, Edward Panelli, and David Eagleson based on their status as defendants in lawsuits filed by Petitioner. On October 17, 1990, the Supreme Court of the State of California denied Petitioner's petition for review and request for disqualification of certain justices. (App. at A-13)

REASONS FOR GRANTING THE WRIT

I.

This Court Should Resolve The Conflict Between The Decisions Of The California Courts And Of This Court As To Whether A Judge, Who Is In Litigation With A Party Before Him, Violates Due Process By Not Recusing Himself.

At the time a panel of the California Court of Appeal for the Fourth Appellate District affirmed the lower court's decision on July 27, 1990, two of the three justices on the panel had been named defendants for over three years in lawsuits in which Petitioner was the plaintiff. At the time the Supreme Court of the State of California declined to review Petitioner's case on October 17, 1990, three of the justices of the California Supreme Court had been defendants for five months to 3½ years in lawsuits filed by Petitioner. Petitioner's lawsuits against Court of Appeal Justices Crosby and Lucas were filed several months before Petitioner subsequently appealed to the State Court of Appeal. Petitioner's lawsuits against the California Supreme Court justices were filed before the Court of Appeal affirmed dismissal of petitioner's two cases at issue and before he petitioned for review in the California Supreme Court. Thus, all of Petitioner's lawsuits against the justices were filed before those justices had jurisdiction over Petitioner's case. The lawsuits were not vindictive or retaliatory in nature.

As opposing parties in pending litigation, the five justices had a direct and personal interest in the outcome of Petitioner's appeal. The refusal of those five justices to recuse themselves from deciding Petitioner's appeal also

created an appearance of partiality. The justices' actual interest in the outcome of Petitioner's case and conflict with defendants Hilbrick and Hodges who he sided for and the appearance of bias violated Petitioner's due process right to an impartial judiciary. The failure of the California Court of Appeal and the California Supreme Court to recognize and uphold Petitioner's due process rights flatly conflicts with numerous decisions of this Court. If allowed to stand, the California courts' decision in the case will create dangerous precedent that will allow judges to decide cases in which they have an interest in the outcome. Therefore, this Court should take the opportunity presented by Petitioner's case to resolve the conflict between the decisions of this Court and the decisions of the California courts and thereby reaffirm the due process rights of all litigants to have their cases decided by impartial tribunals especially where anti-semitism is alleged.

Over six decades ago, this Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio,* 273 U.S. 510, 523 (1927). In *Tumey,* the judge, who was also mayor, had an interest in the outcome of the case because his compensation derived in part from fines levied against persons he convicted. *See id.* at 522-23.

In *Ward v. Monroeville,* 409 U.S. 57 (1972), this Court also found a due process violation in a mayor serving as judge. Although the mayor's compensation did not depend on the levying of fines, the mayor's responsibility for

village finances gave him an interest in whether fines were levied in the cases before him. *See* 409 U.S. at 60.

This Court also has found due process violations where the judge had an interest, albeit not a pecuniary one, in the outcome of a case before him. *In re Murchison*, 349 U.S. 133 (1955), this Court held that a judge who had served as a "one-man grand jury" could not, consistent with the Due Process Clause of the Fourteenth Amendment, also convict a grand jury witness of a contempt charge that arose out of the witness' grand jury appearance. This Court stated that "no man is permitted to try cases where he has an interest in the outcome." *Id.* at 136. A judge's forbidden interest in a case exists in those circumstances that " 'offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused. . . .' " *Id.* (quoting *Tumey*, 273 U.S. at 532).

This Court most recently reaffirmed the due process right to an impartial tribunal in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Lavoie*, a state supreme court justice voted to affirm an award of damages against Aetna at a time when he had pending litigation involving similar claims against other insurance companies. *See* 475 U.S. at 816-19. Although the state supreme court justice was not a party to the lawsuit between Lavoie and Aetna, this Court held that the justice's involvement in similar pending litigation gave him a direct interest in the outcome of the *Lavoie* case. *See id.* at 821-26.

In *Liljeberg*, a federal district court judge also served as a member of a university's board of trustees. 486 U.S. at 850. The judge refused to recuse himself from hearing

a case that, depending upon its outcome, would financially benefit the university. *See id.* at 852-57. Although this Court did not find that the judge had an actual bias, this Court held that the judge's relationship to the university created an appearance of bias. Thus, under Section 455(a) of Title 28, the judge was required to recuse himself because "an objective observer would have questioned [the judge's] impartiality." *See id.* at 861. In so holding, this Court reaffirmed the principle that the appearance of impartiality is a component of the due process right to a fair tribunal. *See id.* at 864-65 & n.12.

Against this backdrop of decisions of this Court, the violation of Petitioner's due process rights hardly could be more blatant. First, the two California Court of Appeal justices and three California Supreme Court justices had a direct, personal, substantial, and pecuniary interest in the outcome of Petitioner's appeal, and influenced nonbiased justices since there were no Jewish justices who sat on Krain's appeal. Petitioner's lawsuits against the justices seek substantial money damages from all defendants and impose on the justices the usual time and financial burdens involved in defending a lawsuit. And, the outcome of Petitioner's appeal has a direct bearing on the success of his lawsuits against those same justices since Hodges and Hilback would be potential witnesses for the justices.

The five justices' pecuniary interest in Petitioner's case is at least as direct and substantial as was the case in *Tumey*, and is more direct than in *Ward*, *Murchison*, and *Lavoie*. Because this Court required recusal in those cases, the justices' more direct interest in Petitioner's case certainly should mandate their recusal here.

Second, the five justices likely have an actual bias against Petitioner because he sued them for money damages and

allegations of civil rights violations against a born Jew under 42 U.S.C. § 1981. At a minimum, the five justices should have been required to establish that they had no actual bias against Petitioner, something they did not do.

Third, even if the five justices had no actual bias against Petitioner, their status as opposing parties in pending litigation created an undeniable appearance of partiality. If a judge's involvement in litigation against an insurance company who is not a party before him creates an appearance of bias, as this Court held in *Lavoie*, then certainly the involvement of judges in litigation with a party whose case *is* before them creates the appearance of a biased tribunal. If an appearance of bias exists when a judge is a trustee of a university that stands to benefit from the outcome of the litigation before him, as this Court held in *Liljeberg*, then certainly an appearance of partiality exists in Petitioner's case, where the judges themselves stand to benefit from Hilbrick's and Hodges' testimony in their own cases.

Although Section 455(a) of Title 28 does not apply here, the standard contained therein clearly illuminates the due process violation present here. Any objective observer would reasonably question the impartiality of the five justices who are in litigation with Petitioner. As this Court has frequently stated, "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." ' " *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 825 (quoting *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))). To allow Petitioner's conviction to stand affirmed by judges who are themselves in litigation with

Petitioner would be an affront to the appearance of justice and to the Due Process Clause. This Court should grant Petitioner's writ and prevent any further insult to a litigant's right to an impartial tribunal.

Krain had a right to litigate 42 U.S.C. § 1981 violations against justices under this Court's holding in *St. Francis Hospital v. Al-Khazrajl*, (1987) 107 S. Ct. 2022, 95 L. Ed. 2d 2582 and the Seventh Circuit decisions deciding Jews are a race as well as religion. *Bachman v. St. Ramos Congregation*, 902 F.2d 1259 (1990 7th Cir.), and *Malholm v. Colls and Company*, 885 F.2d 1305 (7th Cir. 1989).

II.

This Court Should Decide The Important Federal Question Of Whether The State Courts Can Be Held Accountable For Denying Krain The Right To Proceed To Trial Under The California 5 Year Rule And Its Tolling Provision (CCP 583.340) Because Of Racial Bias Against Krain As A Born Jew, Denying Him Due Process And Equal Protection Under The Fifth And Fourteenth Amendments To The United States Constitution.

The appellate court showed anti-semitic bias in deliberately ignoring the minute order of Judge Beacom setting a trial date, status conferences, At Issue Memoranda, and declarations of due diligence by appellant (CT *Krain v. Sundin* Appellate transcript cited in Appellant's Opening Brief G006408, R. 400-649, 576-590, 959-980). For *Krain v. Hilbrick, supra* and *Krain v. Hodges* 40-70-80. Also see Appellant's Opening Brief, page 5, lines 1-4 (R 665-682 and 966-972).

The Court fails to note that the five year period was tolled by appellant's interlocutory appeal, *Kaye v. Mount La Jolla Homeowners Association* (App. 4 Dist. 1988) 149

Cal.App.3d 111, 244 Cal.Rptr. 613 (on *Krain v. Sundin* 45-67-83, G006408, a coordinated case.

As noted by the Second District in *City of Los Angeles v. Gleneagle Development Company* (1976) 62 Cal.App.3d 543, 133 Cal.Rptr. 212, where circumstances indicate a reasonable excuse for delay, an order dismissing an action for want of prosecution will be reversed. Also, the penalty of dismissal against a dilatory plaintiff should be exercised with utmost care and when it appears that plaintiff has a good cause of action, the plaintiff has made no showing of excuse for delay and has waited until last possible moment to file a motion to dismiss, the ends of substantial justice are best met by patience for policy favoring trial on merits as contrasted with policy which favors presumption of prejudice.

As noted by respondents' own case *Hurtado v. Statewide Home Loan Company* (1985) 167 Cal.App.3d 1019, 213 Cal.Rptr. 712, the Fourth Appellate District erred in that respondents failed to demonstrate prejudice by the delay, which they did not do in the lower court. The decision to dismiss for want of prosecution is a matter of law not just discretionary abuse, and there was no showing in the lower court that warranted only the anti-semitic excesses of the state's appellate court.

The five year statute (CCP 583.310) was misapplied to appellant by the Fourth Appellate District (issued raised in and denied in Petition for Rehearing) and this conflicted with state statutory law, prior California Supreme Court case law, *Brunzell Construction Company of Nevada v. Wagner*, 2 Cal.3d 545, 86 Cal.Rptr. 297 and case law from other districts, e.g., the Second District, *Him v. Superior Court*, (1986) 184 Cal.App.3d 35, 228 Cal.Rptr. 839, and in the Fifth District, *Bank of America v. Superior Court*, 200 Cal.App.3d 1009, 246 Cal.Rptr. 521.

Because of the lower court judge's (H. Wolters) violation of California Rule of Court 1541(a) requiring a set timetable within 30 days and his unexplainedly long submission times due to anti-semitism (three years in *Krain v. Nadler,* part of the coordination cases), appellant Krain is not responsible for the delay. See *Bank of America v. Superior Court, supra.*

Appellant Krain vehemently objects to the error at pages 5-6 of the appellate decision (Appendix A) and failure to follow Fifth Circuit law about California Rule of Court 1541(a).

Krain v. Sundin 45-67-83 was a coordinated case with these because by definition the lower court Judge Beacom found it and these coordinated complex litigation and the legal theories that were new were those distinguishing fact from opinion in the context of Krain's complaint about the expectancy of the audience regarding issues of anti-semitism, which have never been considered by a State Appellate court. See *Brown v. Kelly Broadcasting* (1989) 48 Cal.3d 711, 738 fn. 23. The lawsuits on anti-semitism were found to be related events and this was the basis for consolidation (see Beacom's minute order of April 12, 1986, R 236).

The trial court judge's disqualification was an issue in the *Sundin* suit; if the Appellate Court disqualified, then it would have been impracticable to try the case before Judge Wolters and this reasonable delay while *Krain v. Sundin* was reversed was ignored by the trial and appellate courts, whereas other state court districts in California have found with non-Jewish litigants this to be an unreasonable reason for reversal.

The Court ignored abundant case law in the *Brunzell Construction Company v. Wagner, supra* case (State

Supreme Court), the *Rose v. Knapp* case (2nd District), 38 Cal.2d 114, 237 P.2d 981, and *City of Pasadena v. City of Alhambra* (2nd District) (1949) 33 Cal.2d 908, 207 P.2d 17. (See Appellant's Reply Brief of March 26, 1990, page 3, lines 1-12). The Court also ignored Krain's valid argument (Opening Brief, page 10-11) that Krain was diligent and was lulled into a false sense of security by respondents (R 29, 151, 178, 195, 284, 288, 293). As noted in Krain's declarations filed in the lower court, he was lulled into a false sense of security by respondents' statements resulting in inaction and by California case law, respondents are estopped from asserting the right to proceed to trial. *Borglund v. Bombardier Ltd.* (1981) 121 Cal.App. 3d 276, 173 Cal.Rptr. 150.

Also, since appellant was diligent and filed an At Issue Memoranda and the Court arbitrarily took the case off calendar, under California case law, the five year statute was tolled. See *American Benefit Plan Administration, Inc. v. Surety Company of the Pacific* (1983) (2nd District) 145 Cal.App.3d 245, 193 Cal.Rptr. 308 (R 158-160).

The lawsuit entitled *Krain v. Hodges* OCSC No. 40-70-80 was filed by appellant on July 7, 1983. See appellant's declaration (R 158-160). There have been numerous stipulations between appellant and respondents regarding At Issue Memoranda, discovery delays pending before Judge Wolters' rulings in other coordinated cases.

At Issue Memoranda have been filed, discovery with Hodges' deposition properly completed; disputes have arisen precluding further discovery of Hodges (R 169-170) and dilatory conduct by defendants; the anti-semitism of Jerry Hodges goes unchecked and appellant continues to suffer. Since the *Hodges* and *Hilbrick* cases were set for trial within five years, the Fourth District decision con-

flicted with the Second District decision in *Ward v. Levin* 161 Cal.App.3d 1026, 208 Cal.Rptr. 312 (1984). Trial date was set by Judge Beacom on January 12, 1987, and there was estoppel of the five year rule under *Ward v. Levin, supra.* See also *Breacher v. Breacher* (2nd District) 190 Cal.Rptr. 112 (1983).

There was tolling of the five year rule by:

1. Time consumed by appeals pending on causes of action against another group of defendants, *Brunzell Construction Company v. Wagner, supra.* See appeals in *Krain v. Sundin, supra* and *Krain v. Nadler, supra* in other coordinated cases before this Court which consumed two years.

2. Time consumed by appeal of adverse judgment in related case, *Rose v. Knapp,* 38 Cal.2d 114. See *Krain v. Sundin* appeal (two year delay).

3. Time consumed by preparation of referee's report, *City of Pasadena v. City of Alhamba, supra*—Assignment to San Diego judges on three disqualification motions of Wolters, Beacom, and Fitzgerald consumed several months (see Appellant's Reply Brief, pages 5-6).

The five year limitation does not apply in cases where, due to circumstances beyond a party's control, it is impossible, impractical, or futile to bring a case to trial within five years. *Sizemore v. Trinity Lincoln Mercury* (App 2 Dist 1987) 190 Cal.App.3d 84, 235 Cal.Rptr. 243. See appellant's declaration (R 158-160).

In failing to consider the proper facts of the case, the California Court erred. *Nail* and *Hartman* cited in Appendix A are applicable since Judge Beacom assigned trial dates in this case of January 12, 1987; and Krain obtained this date before challenging Beacom, Fitzgerald, and

Wolters. This Court has made clear, cognizable errors of fact and law and should have reversed itself and not affirmed the dismissal of *Krain v. Hodges* (40-70-80) and *Krain v. Hilbrick* (41-83-28) due to anti-semitic bias. Costs should not be allowed to respondents in these cases due to the poverty of appellant and clear errors by this Court of fact and law, especially failing to appoint counsel for an indigent whom they termed incompetent in other cases.

Time under the five year rule to bring an action to trial is tolled by (California CCP 583.340):

1. The jurisdiction of the court to try the action was suspended.

2. Prosecution or trial of the action was stayed or enjoined.

3. Bringing the action to trial for any other reason was impossible, impracticable, or futile.

The Court takes a biased and bigoted anti-semitic view of Krain's illness, failing to take judicial notice under California Evidence Code 452 and 453 of the Superior Court decision in Orange County Superior Court Case C50403 by Judge Green finding Krain incompetent on April 3, 1987, and May 10, 1986, and Magistrate Rose's federal court decision in *Krain v. Smallwood, supra*, to which Justice Crosby is a defendant, finding Krain incompetent, and its own decision in G006120, G006788, and G006520.

Krain's declarations in the lower court demonstrated at R 29, 151, 178, 195, 284, 288, 293, that he tried unsuccessfully to retain an attorney and asked the Court to appoint one, that he was incompetent by decisions of federal and state courts and could not assist one even if appointed. The Court ignored the cases that toll the statute under these circumstances, including those regarding in-

competence. See *Corlett v. Gordon* (1980) 106 Cal.App.3d 1005, 165 Cal.Rptr. 524 where the unexpected illness of a sole practitioner (in this case appellant himself) may constitute circumstances which justify failure to expedite the action for trial and thus preclude dismissal of the action for want of prosecution; and see especially *Him v. Superior Court, supra.*

Specifically, Judge Robert Green's stays of actions due to appellant's incompetency in case C50403 from May 20, 1985, through April 3, 1987, tolled the five year statute for two full years. The jurisdiction to try this action was suspended for nine months due to disqualification appeals and writs for Judge Fitzgerald, Beacom, and Wolters (R 400-649, 586-590, and 959-980).

CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to review the judgment of the Supreme Court of the State of California.

Respectfully submitted,

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APPENDIX

[FILED JULY 27, 1990]
[NOT TO BE PUBLISHED IN OFFICIAL REPORTS]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G008222, G008223, G008224,
G008225, and G008226

(Super. Ct. Nos. 40-70-80, 41-83-29,
45-24-34, 45-28-19, 45-28-41)

LAWRENCE S. KRAIN,

Plaintiff and Appellant,

v.

MARGARET JOHNSON, et al.,

Defendants and Respondents.

OPINION

Appeal from a judgment of the Superior Court of Orange County, Harold F. Wolters, Judge. Affirmed in part and reversed in part.

Lawrence S. Krain, in pro. per., for Plaintiff and Appellant.

Portigal, Hammerton & Allen and John K. Butler for Defendants and Respondents Margaret Johnson, Wallace Wade, Jerry Hodges, James Alfano, James Cordiel and Rocco Galante.

Cummings & Kemp and Joseph P. Foley for Defendant and Respondent Joan Hillbrick.

* * *

In these consolidated appeals, Lawrence Krain challenges a judgment dismissing several defamation actions after defendants' motions for judgment on the pleadings were granted without leave to amend. He also complains the trial court erred in dismissing the remaining actions for failure to bring them to trial within five years. Only the first contention has merit.

I

Five superior court defamation actions are involved in these consolidated appeals listing the following named defendants:

(1) No. 40-70-80: Filed July 7, 1983, Jerry Hodges;

(2) No. 41-83-29: Filed December 15, 1983, Joan Hilbrick;

(3) No. 45-24-34: Filed March 5, 1985, Margaret Johnson;

(4) No. 45-28-41: Filed March 8, 1985, Wallace Wade and Jerry Hodges; and

(5) No. 45-28-19: Filed March 8, 1985, James Alfano, James Cordiel, and Rocco Galante.

The complaints all allege defendants falsely accused Krain of various criminal acts and made disparaging religious and personal remarks about him. The complaints also claim the defamatory statements were not made in the context of any judicial proceeding or within the course and scope of any defendant's official duties.

The next few years proved busy ones. Krain moved to disqualify superior court judges assigned to hear matters on the cases; petitioned for bankruptcy relief; and, accord-

ing to him, spent a good portion of his free time in the CIA "egami-rorrim" hospital in Langley, Virginia.

In March 1989, defendants in the two 1983 vintage lawsuits sought dismissals based on Krain's failure to bring the matters to trial within five years. (Code Civ. Proc., § 583.310.) Defendants in the other three cases moved for judgment on the pleadings. All motions were granted. As to the three latter cases, the court concluded Krain "would not be able to state factually a cause of action" against the remaining defendants.

II

Krain's challenges to the dismissal of the actions filed in 1983 are without merit. First, he complains he did not receive 45-days notice of the motion, citing Code of Civil Procedure section 437c, subdivision (a). But that section applies only to motions for summary judgment. Only the standard 15-day notice was required for the motions filed by these defendants. (Code Civ. Proc., § 1005.) It was given.

Next, Krain argues the five years should be tolled for four distinct reasons: His bankruptcy filing, the pendency of an appeal in an unrelated slander action, his challenges to various superior court judges, and his mental illness. These contentions, too, are meritless.

Lauriton v. Carnation Co. (1989) 215 Cal.App.3d 161 explains the bankruptcy of his bankruptcy argument. There, the Court of Appeals noted simply, "a debtor's cause of action is not tolled by the filing of a bankruptcy petition." (*Id.*, at p. 164.) The *Lauriton* court emphasized a bankrupt has the obligation to diligently pursue litigation he or she initiates. This may include petitioning the

bankruptcy court for permission to proceed in one's own name or for appointment of a trustee to maintain the action on the debtor's behalf. The record is devoid of any evidence that Krain attempted to bring his own lawsuits to trial. The court did not err in refusing to find the bankruptcy petition tolled the five-year period.

Krain also complains the filing of an appeal in yet another similar slander action (*Krain v. Sundin* (Sept. 29, 1989, G006408)) made it "impracticable and impossible" for him to bring these actions to trial within the five-year period.[1] He is wrong.

Tolling under these circumstances is found only where the collateral litigation which has been held up for any of a variety of reasons is deemed a " 'step in the same action sought to be dismissed for lack of prosecution, or in litigation involving the very basis of the action sought to be dismissed, or in other litigation between the same parties or their privies.' [Citation.]" (*Stella v. Great Western Sav. & Loan Assn.* (1970) 13 Cal.App.3d 732, 737.)

In *Stella* plaintiffs sued to rescind a real estate purchase agreement on the same theory as a collective group of homeowners in a parallel case, *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850. In *Connor* the defendant lender successfully moved for a nonsuit and the case remained on appeal until the Supreme Court issued its remittitur. In the meantime, the *Stella* plaintiffs saw their complaint dismissed for lack of prosecution. The appellate court reversed, concluding the "unique circumstances" of the case made it impracticable and futile for the plaintiffs to bring their case to trial. The issues were

[1] In *Sundin* we reinstated Krain's action, finding the allegations of the complaint sufficient to withstand a demurrer.

substantially the same, if not identical, in both cases; and a second trial would have entailed unnecessary expense, duplication, and complexity. Moreover, the key legal issue involved had never been considered by a state appellate court.

These factors do not apply here. Krain's lawsuits are pedestrian matters: None involves complex or technical factual issues, nor do they entail any legal theory not yet recognized by a court of last resort. Other than his role as a plaintiff in each action, the lawsuits are not based on the same events. They concern his allegations that different individuals have made defamatory statements to different other individuals at different times and places. That the alleged defamations are similar provided no reason not to go forward with each case. The defendants, witnesses, and circumstances are only related through Krain and his rocky sojourn through the court system. It is not "impracticable and futile" as a matter of law to try a particular lawsuit simply because similar or even identical legal issues of a mundane nature are pending before an appellate court in this state. As another court has observed, "If it were, the trial of almost every case could be postponed indefinitely." (*Reserve Ins. Co. v. Universal Underwriters Ins. Co.* (1975) 51 Cal.App.3d 57, 63.)

A further challenge to the dismissal under the mandatory five-year statute is launched based on Krain's mental disability and hospitalization in state mental institutions. Plaintiff relies on *Him v. Superior Court* (1986) 184 Cal. App.3d 35. There, the Court of Appeal did conclude the illness of plaintiff's counsel tolled the running of the five-year statute, but cautioned, " 'The critical factor in applying [the impracticability exception] to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.' [Citations.] The law

applicable to the instant case, properly stated, is that '[d]elay attributable to sickness or death of counsel . . . is not *necessarily* excusable. Each case must be decided on its own peculiar features and facts.' " (*Id.*, at p. 39.)

The record indicates Krain, who was representing himself for most of the time in these matters, was able to accomplish various legal machinations while the cases filed in 1983 were pending. The trial court did not believe his hospitalization provided an excuse for the unwarranted delay in prosecuting them, and substantial evidence supports that finding. Krain's health problems are not defendants' responsibility. It was his burden to bring his actions to trial. He was not too sick to file them in the first place. He failed to entrust his lawsuit to an attorney while he was ill, and the record contains no evidence that his health would have prevented him from doing so. At a minimum he should have demonstrated reasonable but unsuccessful efforts to retain an attorney. He did not.

Relying on *Nail v. Osterholm* (1970) 13 Cal.App.3d 682, plaintiff argues the time consumed in his challenges to Superior Court Judges Wolters and Fitzgerald should be excluded in computing the five-year term. Again, we disagree.

In *Nail* the plaintiff in a medical malpractice action obtained a trial date well within the five-year period. On the scheduled trial date, the judge informed counsel the defendant had treated his son. To the surprise of no one, plaintiff's counsel challenged the trial judge pursuant to Code of Civil Procedure section 170.6. No other judge was available, and the court dismissed the jurors. The matter was reset for trial several months after the expiration of the five-year period, and defendant successfully moved to dismiss. The appellate court reversed: "[I]f a

case is timely *set for trial, and if thereafter* a challenge against the trial judge to whom it is assigned is allowed, not only is it the duty of the court to assign the case to another judge . . . but the period that the trial is held in abeyance pending the assignment of another judge is to be disregarded in considering a subsequent motion to dismiss." (*Id.*, at p. 686; see also *Hartman v. Santamarina* (1982) 30 Cal.3d 762, 768.)

Nail and *Hartman* are inapt. In each the plaintiff secured a trial date well in advance of the five-year deadline and demonstrated a reasonably diligent effort to bring the matter to trial within the statutory period. And, in both cases, the section 170.6 challenge issued *after* assignment of a trial date. Our facts are readily distinguishable. Krain failed to bring the actions he filed in 1983 to trial within five years and never obtained a trial date before his challenges to the judges. Since the mandatory period was not tolled, the court had no choice but to dismiss those cases.

III

Krain is entitled to relief with respect to the remaining three actions, however. The trial court granted motions for judgment on the pleadings as to them without leave to amend, finding the complaints did not "state facts sufficient to constitute a cause of action" and Krain "would be unable to state factually a cause of action as against" these defendants. Defendants' motions raised statutory privileges and the defense of governmental immunity. (See Civ. Code, § 47, subds. (2), (3) & (4); Gov. Code, §§ 820.2, 821.6.) A supporting memorandum of points and authorities filed by Hodges and Wade requested the court to take judicial notice of Krain's ongoing criminal and Board of Medical Quality Assurance mat-

ters, suggesting he filed these lawsuits in retaliation for their efforts to prosecute him for Medi-Cal fraud.

Time will probably prove the trial court correct; but a motion for judgment on the pleadings, like a demurrer, tests only the sufficiency of the plaintiff's allegations, not the strength of the defense evidence. In that regard, we must accept all properly pleaded allegations as true. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Krain has adequately pleaded the elements for causes of action in defamation. Where necessary, he also carefully alleged the defendants acted "independently and not in the course [of] or related to their prosecutorial employment or in any judicial setting protected by immunity." That is sufficient to defeat a motion for judgment on the pleadings.

Nor are we persuaded by defendants' assertion that the allegedly slanderous statements were protected opinion rather than actionable statements of fact. It is well settled that "California law allows recovery for a slander only for a false statement of *fact.* Statements of opinion are not actionable. [Citation.] Whether a charged defamatory statement is a statement of fact or a statement of opinion is a question of law. [Citations.] The question of what is opinion as distinguished from a false statement of fact is a difficult one. What constitutes a statement of fact in one context may be a statement of opinion in another in the light of the nature and content of the communication taken as a whole. [Citation.] Decisions have characterized alleged defamatory statements as fact or opinion upon a consideration of the particular circumstances in which the statements were made and with special attention to the probable expectancy of the audience to whom the statements were addressed. [Citations.]" (*Lagies v. Copley* (1980) 110 Cal.App.3d 958, 966-967, disapproved on another point in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.

App.3d 711, 738, fn. 23; *Grillo v. Smith* (1983) 144 Cal. App.3d 868, 871; cf. *Milkovich v. Lorain Journal Co.* (June 21, 1990) ____ U.S. ____ [statements of opinion which include a provably false factual connotation are not protected speech under the First Amendment to the federal Constitution].)

Most, if not all, the statements alleged here do not qualify as mere expressions of opinion. Krain alleged he was branded as "dishonest," a "malingerer," and a "killer and threat to society" who bribed another to commit perjury in judicial proceedings. (Cf. *Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 681 [statements held not factual in nature which did not "impute crimes or dishonesty to plaintiffs"].)

Defendants' assertion of privilege must also fail. No court has ever held that statements made to newspaper reporters by persons acting in private capacities outside judicial proceedings are privileged under California law (Civ. Code, § 47). Such a bizarre application would emasculate the law of defamation, and we reject it out of hand. The statements allegedly made to judges and other public officials will probably turn out to be privileged, but for present purposes it is sufficient that Krain has alleged at least one individual to whom no claim of privilege could attach heard each slanderous statement.

Similarly, the claims of immunity by Wade and Hodges per Government Code section 821.6 must fail. That section only applies to official actions within the "scope of employment." Krain has pleaded around that barrier, and no amount of judicial notice of the district attorney's investigation of him can overcome his artful draftsmanship on a motion for judgment on the pleadings. If, as is likely the case, Krain's present complaint is a sham in this

respect, other remedies may be available, at least in theory. (See e.g., Code Civ. Proc., § 128.5.)

The same analysis applies to the contention that Krain has failed to comply with the Tort Claims Act with respect to various defendants. They are specifically *not* sued in any official capacity, and the act does not apply as the present complaint is pleaded.

The judgments dismissing the complaints against Hodges and Wade (45-28-41); Alfano, Cordiel, and Galante (45-28-19); and Johnson (45-24-34) are reversed. The judgments in cases 40-70-80 and 41-83-29 are affirmed. Costs shall be allowed to the prevailing parties in each.

Crosby, Acting P.J.

We concur:

Wallin, J.

Cox, J.*

* Assigned by the Chairperson of the Judicial Council.

[FILED AUGUST 15, 1990]

COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division Three

KRAIN, LAWRENCE S.
v.
HILBRICK, JOAN
G008222, G008223, G008224, G008225 & G008226
Orange County No. 41-83-29

THE COURT:

The petition for rehearing is DENIED.

CROSBY, J.
Justice

We Concur:

WALLIN, J.
Acting Presiding Justice

s/ COX
Justice

cc: Orange County Clerk
All Counsel

[FILED OCTOBER 17, 1990]

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Three, No. G008222
S017193

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANC

LAWRENCE S. KRAIN, Appellant

v.

MARGARET JOHNSON Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

[FILED OCTOBER 17, 1990]

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Three,
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S017193

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANC

LAWRENCE S. KRAIN, *Appellant*

v.

MARGARET JOHNSON et al., *Respondents*

Petitions for review and stay of remittitur and request for disqualification of certain justices DENIED.

Acting Chief Justice